

## **REMARKS**

### **I. Background**

The present Amendment is in response to the Office Action mailed April 6, 2006. Since claims 13-19, 21, and 22 have been previously withdrawn, claims 1-12, 20, and 23 were pending in the application for consideration at the time of the mailing of the Office Action. Claims 1, 20, and 23 are currently amended. Claims 1-12, 20, and 23 are still pending for consideration.

Reconsideration of the application is respectfully requested in view of the above amendments to the claims and the following remarks. For the Examiner's convenience and reference, Applicants' remarks are presented in the order in which the corresponding issues were raised in the Office Action.

### **II. Proposed Claim Amendments**

Please amend the claims in the manner indicated above, where an underline represents new text, and strikeouts are used to indicate deleted text. The amendments to claims 1, 20, and 23 have been made to place the claims in condition for allowance, and are fully supported by the application as originally filed. Thus, Applicants submit that the amendments to the claims do not introduce new matter and entry thereof is respectfully requested.

### **III. Rejections on the Merits**

#### **A. Rejections Under 35 U.S.C. § 103**

The Office Action has rejected claims 1-12, 20, and 23 under 35 U.S.C. § 103(b) as being unpatentable over *Su et al.* (U.S. Appl. No. 2002/0068102) in view of *Fischer et al.* (U.S. Pat. No. 5,433,965) or *Downton et al.* (U.S. Pat. No. 5,411,755) or over *Yegerova et al.* (U.S. Pat. No. 6,387,370) in view of *Fischer et al.* (U.S. Pat. No. 5,433,965) or *Downton et al.* (U.S. Pat. No. 5,411,755). In this response, claim amendments and clarifying remarks are presented to address the Examiner's concerns.

Based on the amendments and arguments presented herein, Applicants believe that the claims are in position for immediate allowance. Applicants respectfully argue that this is so because Applicants' claims are directed, at least in part, to a previously unknown flavor masking property of powdered Luo Han Guo extract, the prior art teaches away from the use powdered Luo Han Guo extract, and the combination of references cited by the Examiner does not teach each and every element of the claims.

#### **1. Sweetening and Flavor Masking are Different and Separable Properties of Liquid and Powdered Extracts of Luo Han Guo**

Applicants respectfully assert that neither the combination of *Su* and *Fischer* or *Downton* nor the combination *Yegerova* and *Fischer* or *Downton* teach the use of powdered Luo Han Guo as a flavor masking agent. And while the combined references do teach liquid Luo Han Guo as a sweetening agent, sweetening is not the same as flavor masking. Thus, applicant respectfully asserts that neither the combination of *Su* and *Fischer* or *Downton* nor the combination *Yegerova* and *Fischer* or *Downton* teach or address Applicant's unexpected discovery that powdered Luo Han Guo extract has a previously unknown and desirable flavor masking property that allows it to mask the unfavorable scent and/or flavor of noni juice.

Applicants respectfully assert that it is well recognized that sweetening is a characteristic separate and distinct from masking an unfavorable flavor and/or scent. For example, under applicable United States Federal regulations, sweetening and flavoring are classified as separate and distinct properties for food additives. Sweeteners, such as liquid Luo Han Guo extract, are classified according to their caloric content and their "sweetening capacity" relative to sucrose. See e.g., 21 C.F.R. 170.3(19) and 21 C.F.R. 170.3(21). Notably, no mention is made of

sweeteners having any intrinsic flavor, nor is there any mention of their ability to mask or enhance flavors. *Id.* In contrast, flavor enhancers and/or flavor maskers, such as powdered Luo Han Guo extract, are classified as "[s]ubstances added to supplement, enhance, or *modify* the original taste and/or aroma of a food, without imparting a characteristic taste or aroma of its own. 21 C.F.R. 170.3(11) (emphasis added). The Code of Federal Regulations further defines a flavoring as a substance added to food "whose significant function in food is flavoring." 21 C.F.R. 101.22(3).

The present invention claims a dietary supplement comprising noni fruit powdered Luo Han Guo. Claim 1 is representative of the supplement's composition: "[a] dietary supplement comprising: noni fruit; Luo Han Guo in an effective amount to mask flavor and/or scent of the noni fruit; and water; wherein the dietary supplement is prepared by combining noni fruit with a powdered extract of Luo Han Guo." As recited in the specification, Luo Han Guo has two different extracts with separate and distinct properties: liquid Luo Han Guo extract provides sweetening and powdered Luo Han Guo extract provides flavor masking. That is, liquid Luo Han Guo extract is added as a sweetening agent and powdered Luo Han Guo extract is added to mask the unfavorable flavor and/or scent of the noni juice. Applicants respectfully assert that the different characteristics of the liquid and powdered extracts of Luo Han Guo were unknown with respect to the ability to provide the liquid extract for sweetening and the powdered extract for masking the flavor and/or scent of noni fruit.

Additionally, a composition having an unfavorable flavor and/or scent can be sweetened while still retaining the unfavorable flavor and/or scent. While additional sweeteners can be added, there is no indication that the sweetener can mask the unfavorable flavor and/or scent. As such, liquid extract of Luo Han Guo may be used as a sweetener; however, the liquid extract of Luo Han Guo does not have any flavor and/or scent masking properties. On the other hand, the previously unidentified property of the powdered extract of Luo Han Guo has now been found to be useful in masking the unfavorable flavor and/or scent of noni fruit. Applicants respectfully assert that a composition containing noni fruit or any other substance with an unfavorable taste and/or smell can be sweet while still having an unfavorable taste and/or smell. Thus, Applicants have overcome the problem of noni fruit compositions having an unfavorable taste and/or smell by mixing powdered extract of Luo Han Guo into the composition with the noni fruit.

## **2. Teaching Away**

Applicants respectfully assert that both *Fischer* and *Downton*, alone or in combination with *Su* or *Yeagerova*, teach away from the use of powdered Luo Han Guo extract. Powdered extract of Luo Han Guo is made from dried Luo Han Guo fruit. (See, e.g., *Fischer*, Col. 1, lines 45-46). *Fischer* and *Downton* specifically state that the drying process that occurs prior to powdering "causes the formation bitter, astringent, and brown flavors." (*Fischer*, Col. 1, lines 53-59; *Downton*, Col. 1, lines 63-68, emphasis added). Furthermore, the final product of the processes taught by *Fischer* and *Downton* is a sweet liquid that is free of all of the so-called "unattractive" flavors inherent in a powdered extract of Luo Han Guo (see, e.g., *Fischer*, col. 2, lines 13-15, and col. 2, lines 36-38). The liquid extract of Luo Han Guo taught by *Fischer* and *Downton* is suitable only for sweetening. Thus, *Fischer* and *Downton* both teach away from the presently claimed invention because of their stated view that powdered Luo Han Guo is undesirable due to the presence of "bitter, astringent, [or] brown flavors."

## **3. Combination Does Not Teach Each Claim Limitation**

Applicants respectfully assert that neither the combination of *Su* and *Fischer* or *Downton* nor the combination *Yeagerova* and *Fischer* or *Downton* teach each and every claim limitation of the presently claimed invention. Specifically, neither *Su* and *Fischer* or *Downton* nor *Yeagerova* and *Fischer* or *Downton* teach that a powdered extract of Luo Han Guo can be used to mask the flavor and/or scent of the noni fruit utilized in the dietary supplement or the dietary supplement itself. As such, none of the references, alone or in combination, teach or suggest a dietary supplement comprising "noni fruit; Luo Han Guo in an effective amount to mask flavor and/or scent of the noni fruit; and water; wherein the dietary supplement is prepared by combining noni fruit with a powdered extract of Luo Han Guo," as recited in claim 1. Since neither *Su* and *Fischer* or *Downton* nor *Yeagerova* and *Fischer* or *Downton* teach or suggest a powdered extract of Luo Han Guo in an effective amount to mask flavor and/or scent of the noni fruit, each and every element of the presently pending claims has not been taught or suggested by the proposed combination of references.

Applicants respectfully assert that obviousness has not been established for claim 1 under 35 U.S.C. § 103 because neither the combination of *Su* and *Fischer* or *Downton* nor the

combination *Yegerova* and *Fischer* or *Downton* disclose the flavor masking property of powdered Luo Han Guo extract, the references teach away from the use of powdered Luo Han Guo extract, and the combination of references does not teach each and every element of the claims. Additionally, claims 2-12 depend from claim 1, and thereby are allowable for the same reasons claim 1 is allowable. Moreover, independent claims 20 and 23 both recite that the powdered extract of Luo Han Guo is combined with noni fruit to mask the flavor and/or scent of the noni fruit, and thereby are allowable for substantially the same reasons as claim 1. As such, Applicants respectfully request that the rejection of claims 1-12, 20, and 23 be withdrawn.

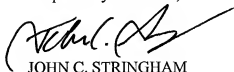
### CONCLUSION

In view of the foregoing, Applicants respectfully submit that the rejections to the claims are now moot. Applicants believe claims 1-12, 20, and 23 are in allowable form as discussed above. Thus, Applicants respectfully request reconsideration of the application and allowance of presently pending claims.

In view of the foregoing, Applicants respectfully request favorable reconsideration and allowance of the present claims. In the event the Examiner finds any remaining impediment to the prompt allowance of this application which could be clarified by a telephone interview, the Examiner is respectfully requested to contact the undersigned attorney.

Dated this 5<sup>th</sup> day of October, 2007.

Respectfully submitted,



JOHN C. STRINGHAM  
Registration No. 40,831  
Attorney for Applicants  
Customer No. 022913